IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. _____

CHARLES ZEMLIAK,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

ELIOT B. FELDMAN
6505 Wilshire Boulevard
Los Angeles, California 90
(213) 653-9430

MELVIN W. MILLER
9601 Wilshire Boulevard
Beverly Hills, California 9
(213) 278-1477

Attorneys for Petitioner

TOPICAL INDEX

	Page
Table of Authorities	ii
JURISDICTION AND STATEMENT	1
Representations As to Probation	3
Plea Based on Mistake	8
Inability Or Failure of Counsel Herein to Investigate the Facts Upon Which the Charge Was Based and Defenses Thereto, and Confer With Client With Regard to Facts, Essential Elements of the Crime and Defenses Thereto, As Well As Proof Requirements Thereof, Constitutes Further Grounds for Requiring the Vacating of the Plea Herein.	10
The Court Did Not Determine, When Accepting the Plea, Whether the Plea Was Voluntarily and Knowingly Made (Whether Appellant Understood the Law in Relation to the Facts, the Factual Basis and Essential Elements of the Charge Or the Defenses Thereto).	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
Abraham v. State, 228 Ind. 179, 91 N. E. 2d 358	11
Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709	12
Colson v. Smith, 438 F. 2d 1075	11
Commonwealth v. Wilkins, 277 A. 2d 341, 442 Pa. 524	8
Jones v. Cunningham, 297 F. 2d 851	11
McCarthy v. U.S., 394 U.S. 459	12
Santobello v. New York, 404 U.S. 257	7, 8
State v. Loyd, 190 N. W. 2d 123	9
State ex rel. Denning v. Regg, 251 Minn. 120, 86 N. W. 2d 723	11
U.S. v. Pallotta, 433 F. 2d 594	9
White v. Gaffney, 435 F. 2d 1241	8

Statutes

Calif. Penal Code Section 487.1	2
Title 28, Sec. 1257, U.S.C.	1

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1971
No. _____

CHARLES ZEMLIAK,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of California entered in the above-entitled case on January 19, 1972.

JURISDICTION AND STATEMENT

This Court has jurisdiction under Title 28, Sec. 1257, U.S.C.

On November 7, 1968, petitioner pleaded guilty in the Los Angeles Superior Court to a charge of grand theft, in violation of California Penal Code Section 487.1 (based on the acceptance of money for investment purposes).

In May, 1969, petitioner's motion to withdraw his guilty plea was heard and denied by the court (C. T. 6-45). Said motion was based on petitioner's contentions that (1) the plea was entered in reliance upon promises as to probation made to him on behalf of the district attorney, and those promises had been breached; (2) the plea was entered as a result of petitioner's "mistake, ignorance, or inadvertence" as to probation, the facts, the factual basis and essential elements of the charge and the defenses thereto, as well as proof requirements; (3 the plea had been entered because of reliance upon inadequate counsel; and (4) the plea was entered without a proper inquiry by the court as to whether petitioner was making the plea knowledgeably and voluntarily.

Petitioner, during the Probation and Sentencing Hearing in June, 1969, unsuccessfully renewed his aforementioned motion (C. T. 55; R. T. 636-687). Thereafter, probation was denied, a judgment of conviction was entered, and petitioner was sentenced to state prison for the term prescribed by law. Petitioner duly appealed from the judgment to the California Court of Appeal (C. T. 56-59).

The Court of Appeal affirmed the judgment on November 24, 1971. A copy of that

court's opinion is attached as Appendix "A" hereof. Petition for rehearing to the Court of Appeal was denied. Petition for Hearing to the California Supreme Court was denied on January 19, 1972. See Appendix "B", attached hereto. 1/

Representations As to Probation

Petitioner's sworn statement in support of the aforementioned motion alleged that (C. T. 8, 9)

> ". . . his attorney (trial counsel P. Basil Lambros) informed him that if he would plead guilty to Count I, that the District Attorney's office would be neutral on the issue of probation and the investigation would not be continued; had he known that the District Attorney, in breach of his agreement, intended to pursue the investigation and transmit the results thereof to the Probation Department with the consequence that his chances of obtaining probation would be considerably lessened, he would not have pled guilty; that

1/ Mr. Justice Douglas granted an extension of time to June 17, 1972 to file this Petition for Certiorari. See discussion hereinafter.

said office did pursue the investigation and submit reports based thereon to the Probation Department."

Petitioner's trial counsel (P. Basil Lambros) in a sworn statement in support of the motion to withdraw his plea, stated that the District Attorney's office had stated that it would neither recommend nor oppose probation, but that if the probation officer requested the reports that the District Attorney had already gathered, the same would be transmitted to the Probation Department; that he (Lambros) was under the impression from his discussions with the District Attorney's office that a plea of guilty would result in a discontinuance of the investigation which, in turn, would result in probation; that he consequently communicated assurances to petitioner that if he entered a plea of guilty the investigation would terminate. The District Attorney's office (in papers submitted in opposition to the motion) admitted that counsel had asked whether that office "would be neutral in the matter of probation," and that the office replied that it would not "make any comments to the probation officer regarding any aspects of the case to sway the Probation Department or to help them make any decision in this particular matter at any time" (C. T. 36, 37). Nevertheless (petitioner alleged in the said motion) the District Attorney's office breached that understanding, pursued the investigation and transmitted the reports thereof to the Probation Department. Moreover, after this breach, which was the subject of the original motion, the District Attorney's office committed

a more flagrant breach at the subsequent Probation and Sentencing Hearing, when that office expressly stated to the Court that the "People request that probation be denied and that the defendant be sentenced to the State Prison" (R. T. 686, lines 21-22). The Deputy District Attorney's claim that he had indicated to Appellant's trial counsel that at the time of sentencing he "would make comments to the court indicating that this was a 'state prison' type case" [emphasis supplied] (C. T. 37) is not the equivalent of a specific, express request for a denial of probation, and sentence to the state prison; nor is it a warning that such a request might be made.

On or about February 10, 1972, petitioner filed with this Court an Application For Bail and Stay Pending Filing of Petition for Certiorari. Said application, numbered A-833, was informally denied. On February 18, 1972, said motion was orally renewed and petitioner informed this Court by telegram of newly obtained admissions on the part of George Rhodes, the former prosecutor in the case. On February 22, 1972, Mr. Rhodes telegraphed this Court certifying to the accuracy of petitioner's said telegram, and on February 25, Mr. Rhodes executed a sworn statement which was transmitted to this Court reaffirming the accuracy of said telegrams and expressly admitting his breach of his promises to stay neutral on the issue of probation and neither oppose nor recommend same and to discontinue the investigation (he admitted also in said statement that he ordered a full report and transmitted the

the results of the amplified investigation to the Probation Department). In a Declaration dated February 28, 1972, and submitted to this Court, Rhodes stated that an investigator for the District Attorney "without my knowledge did continue his investigation and include the findings of such investigation in his report to the probation department." Said telegrams and declarations are on file in this Court in case numbered A-833.

Justice William O. Douglas of this Court issued an order (case numbered A-833) on March 3, 1972, stating that:

> "It appears that, subsequent to the denial of the application for bail, facts have come to light suggesting that petitioner may have a substantial claim under this Court's recent decision in Santobello v. New York, 404 U.S. 257. These facts are disputed, however, and have not been considered in any lower court which has previously ruled on this cause. Therefore, since the substantiality of the petitioner's application appears to depend upon an evidentiary inquiry, more appropriately undertaken by another tribunal, the reapplication for bail is denied."

On April 14, 1972, Mr. Justice Douglas signed an order extending the time to file a petition for Writ of Certiorari in this Court to June 17, 1972 (case number A-1072).

On or about March 13, 1972, petitioner filed a habeas corpus proceeding in the California Court of Appeal, Second Appellate District (2nd CRIM 21495) praying for, among other relief, an evidentiary hearing in accordance with the suggestion of Justice Douglas. That Court on March 15, 1972, ordered that the prosecution show cause in the Los Angeles Superior Court why a writ of habeas corpus should not issue as prayed in said petition. A copy of said order is attached as Appendix "C". After a hearing at the Los Angeles Superior Court on April 27, 1972, the court discharged said order to show cause and denied petitioner the relief sought in said habeas corpus proceeding.

On May 8, 1972, petitioner duly filed a notice of appeal from the said April 27, 1972 ruling of the Los Angeles Superior Court to the California Court of Appeal. Said appeal is now pending in that court.

This Court, in Santobello v. New York, 404 U.S. 257, decided on December 20, 1971, after the filing of the Opinion of the California Court of Appeal herein, vacated, on federal constitutional grounds, a state criminal conviction based on a guilty plea where a promise "that there would be no sentence recommendation by the prosecution" was breached and the prosecutor "recommended the maximum one-year sentence." Santobello, supra, it is submitted, is indistinguishable from the case at bench and mandates, on federal constitutional grounds, reversal of the judgment of conviction herein. (See concurring opinion, Mr. Justice Douglas.)

In the case at bench, petitioner's trial counsel's sworn allegation, undenied by respondent, that the district attorney's office stated that it "would neither recommend or oppose probation," is identical to the prosecution promise in Santobello, supra, "that there would be no sentence recommendation by the prosecution."

Petitioner cited and argued the Santobello case to the California Supreme Court in its unsuccessful Petition for Hearing in that Court.

In Commonwealth v. Wilkins, 277 A. 2d 341, 442 Pa. 524 (1971) the Supreme Court of Pennsylvania held that defendant had the right to withdraw his plea where the prosecutor's promise as to sentence recommendation was not kept, although the defendant told the court that no one -- his own attorney, the state's attorney or the judge -- had promised him any specific sentence, and he understood that if he pleaded guilty, he would be sent away for a long time. See also: White v. Gaffney, 435 F. 2d 1241 (10th Cir., 1970) (promise to recommend sentence not kept; plea vacated, although sentencing Court stated it would not be influenced by recommendations and defendant told court his plea was not induced by promises).

Plea Based on Mistake

An additional ground for requiring the setting aside of the plea herein is the fact that it was based on mistake, ignorance or inadvertence

as to probation, the facts, the factual basis and essential elements of the charge, the defenses thereto and proof requirements.

In U.S. v. Pallotta, 433 F.2d 594 (1st Cir., 1970) the Court ordered a hearing when defendant alleged that his counsel told him that in exchange for a guilty plea the prosecutor had promised to recommend a lighter sentence, which promise was not kept. The Court stated that even if no such agreement existed, the voluntariness of the plea "would be seriously in question if it was induced by representations by court-appointed counsel that such an agreement was in effect."

In State v. Loyd, 190 N.W.2d 123 (Minn. 1971) the Minnesota Supreme Court ordered the withdrawl of the guilty plea where defense counsel led defendant to believe that he could withdraw his guilty plea if the agreement with the prosecutor as to sentencing was not approved by the Court. The sentencing Court disregarded the agreement and imposed the maximum sentence; defendant had stated to the Court that he understands that the sentencing Court might not abide by the agreement and that he pleads guilty nevertheless.

Inability Or Failure of Counsel Herein to Investigate the Facts Upon Which the Charge Was Based and Defenses Thereto, and Confer With Client With Regard to Facts, Essential Elements of the Crime and Defenses Thereto, As Well As Proof Requirements Thereof, Constitutes Further Grounds for Requiring the Vacating of the Plea Herein.

Petitioner's trial counsel had insufficient time, and failed, to make any inquiry into the facts or the factual bases of the charge or of the defenses thereto. Indeed counsel was unaware of the facts (R. T. 647; C. T. 19-22). The record reveals no evidence that counsel, nor anybody else, conferred with, or advised petitioner relative to the facts or the necessary elements of the charge herein (or the proof requirements), or the defenses thereto. See, e.g., petitioner's (appellant's) Opening Brief 2/ to the California Court of Appeal, pp. 3-20; counsel was handed, minutes before court appearance time, the felony complaint, and defendant, "upon quickly reviewing same, agreed to plead guilty to the first Count thereof." There is nothing in any of the statements by the People which contradicts the sworn claim that petitioner's consultation with counsel herein, at least as to the count to which the plea was entered (Firestone's $10,000.00 of January 4, 1966), lasted only a few minutes (C. T. 19; R. T. 647).

2/ Lodged herewith as Appendix "D".

In Colson v. Smith, 438 F. 2d 1075, 1081 (5th Cir., 1971) the Court invalidated a guilty plea where there "was no evidence that counsel's advise to plead guilty was based on any evaluation of petitioner's chances had he gone to trial."

Other examples of reversals include:

Abraham v. State, 228 Ind. 179, 91 N. E. 2d 358 (1950), twenty-minute conference; Jones v. Cunningham, 297 F. 2d 851 (4th Cir. 1962) (guilty plea after superficial investigation); State ex rel. Denning v. Rigg, 251 Minn. 120, 86 N. W. 2d 723 (1957) (guilty plea after ten-minute consultation with attorney).

> "One of the most important reasons for requiring counsel is to protect the defendant from pleading guilty to a charge which the evidence does not establish" (State v. Richardson, 194 Kan. 471, 399 P. 2d 799, 815 (1965).

The Court Did Not Determine, When Accepting the Plea, Whether the Plea Was Voluntarily and Knowingly Made (Whether Appellant Understood the Law in Relation to the Facts, the Factual Basis and Essential Elements of the Charge Or the Defenses Thereto).

The trial court, at the time of the plea, failed to determine whether or not Petitioner understood the law in relation to the facts, i. e., the factual basis and essential elements of the charge or the defenses thereto (so that he could determine whether his conduct fell within the charge).

Whether or not Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 is retroactive, the principles propounded therein should be controlling inasmuch as the charge herein involves complicated commercial and economic facts, as well as issues of proper bookkeeping and Petitioner's involvement therein and comprehension thereof. The charge has specific substantive elements as set forth in the Opening Brief (pp. 39-47) as well as proof requirements. When added to the above is ignorance or mistake of the basic facts (caused by ineffective counsel), substance is afforded to Petitioner's claim that he was induced to plead guilty not only without an understanding of the nature of the charge but, in the words of McCarthy v. U.S., 394 U.S. 459,

"without realizing that his conduct does not actually fall within the charge."

CONCLUSION

The judgment of conviction herein, obtained in contravention of constitutional principles, as set forth hereinabove, should be reviewed by this court and reversed.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

ELIOT B. FELDMAN
MELVIN W. MILLER

Attorneys for Petitioner

June, 1972

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal-Second Dist.
FILED
Nov. 24, 1971
Clay Robbins, Jr., Clerk

THE PEOPLE,	)	
	)	
Plaintiff and Respondent	)	
v.	)	
	)	
CHARLES ZEMLIAK,	)	
	)	
Defendant and Appellant	)	2d Cr. No. 17226 S.C. No. A-238384

APPEAL from a judgment of the Superior Court of Los Angeles County. William B. Keene, Judge. Affirmed.

Eliot B. Feldman for Defendant and Appellant.

Evelle J. Younger, Attorney General, William E. James, Assistant Attorney General, and Norman N. Flette, Deputy Attorney General, for Plaintiff and Respondent.

By complaint, defendant was charged in Count I with grand theft (a violation of Pen. Code section 487.1), to which defendant pleaded guilty on November 7, 1968; the other counts charged in the complaint were dismissed on motion of the People. On May 9, 1969, defendant's motion to withdraw his guilty plea was argued by both parties and denied on May 26, 1969 by the court. During defendant's probation and sentencing hearing on June 18, 1969, he renewed his motion to withdraw his guilty plea, and it was again denied, as was his motion to have the matter transferred back to the municipal court. Thereafter, probation was denied, a judgment of conviction was entered, and defendant was sentenced to state prison for the term prescribed by law. Defendant appeals from the judgment.

Defendant's contentions on appeal are that the trial court erred in not allowing him to withdraw his guilty plea because: (1) the plea was entered in reliance upon certain promises made to him on behalf of the district attorney, and those promises had been breached; (2) the plea was entered as a result of defendant's "mistake, ignorance, or inadvertence" as to the nature of the charge; (3) the plea had been entered because of reliance upon inadequate counsel; and (4) the plea was entered without a proper inquiry by the court as to whether defendant was making the plea knowledgeably and voluntarily.

Defendant's first three contentions may be dealt with as a trilogy. We recognize that, if proved, each of defendant's first three contentions would constitute a ground upon which a trial court could properly allow a guilty plea to be

withdrawn. [1] However, in the trial court, defendant had the burden of proving his contentions by clear and convincing evidence. (People v. Barteau, 10 Cal. App. 3d 483, 486.) In addition, "[t]he granting or denial of a motion by defendant toto withdraw his plea of guilty rests in the sound discretion of the trial judge and his decision will not be disturbed on appeal unless an abuse of that discretion is clearly shown." (People v. Gannaro, 216 Cal. App. 2d 25, 28.) Here, the trial judge held a hearing in which both sides were given an opportunity to argue the motion. In addition, the judge had before him the transcript of the hearing in which defendant entered his guilty plea, defendant's written motion to withdraw his plea, together with defendant's declarations, affidavits, and

---

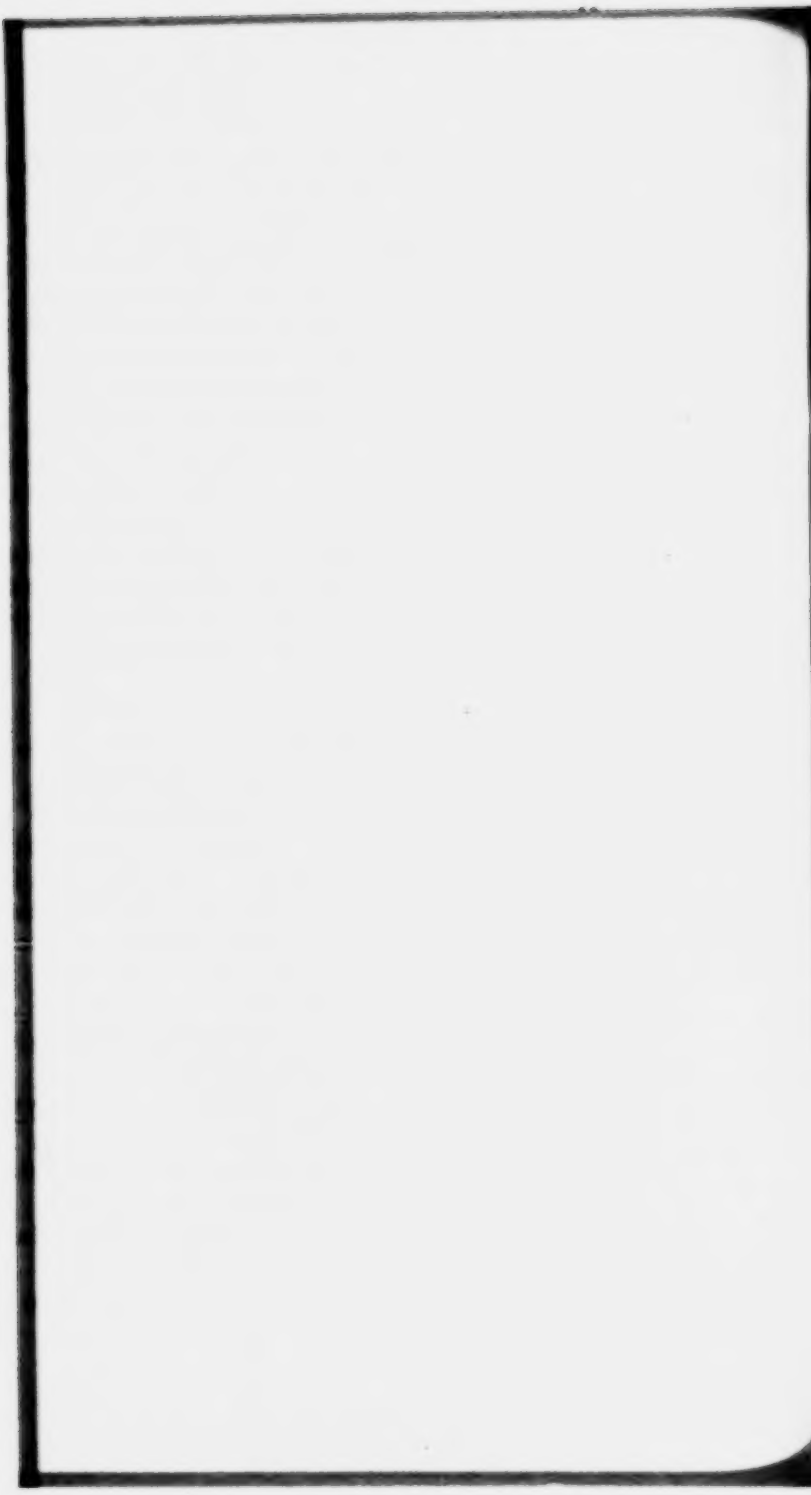
1/ People v. Barteau, 10 Cal. App. 3d 493, 486 held: "Where a guilty plea is entered as a result of plea bargaining, and . . . where the state has failed to perform its part of the bargain, then the trial court may allow a plea withdrawal."

People v. Brotherton, 239 Cal. App. 2d 195, 200 held: "[A] plea of guilty may be withdrawn . . . by reason of mistake, ignorance, inadvertence or any factor that overcame the defendant's exercise of a free judgment."

In re Williams, 1 Cal. 3d 168, 175 held: "Deprivation of the right to counsel at the pleading stage because of incompetency can constitute a deprivation of due process."

points and authorities; the judge also had before him the district attorney's declarations, together with his points and authorities in opposition to the motion. In brief, the evidence presented on behalf of defendant tended to support each of his first three contentions, and the evidence presented on behalf of the district attorney tended to refute each of defendant's first three contentions. The judge weighed the evidence and denied the motion. On appeal, defendant seeks, in effect, to reargue the issue and asks the appellate court to reweigh the evidence. Defendant's burden on appeal is to show that the trial judge "clearly abused his discretion," and that burden has not been met. We have reviewed the record and find ample evidence to uphold the trial court's decision.

Defendant's fourth contention is that the judge who accepted his guilty plea improperly failed to determine whether defendant was making his plea "voluntarily and knowingly." Specifically, defendant relies upon Boykin v. Alabama, 395 U.S. 238 for authority that it is a violation of "the due process clause of the Fourteenth Amendment to accept a guilty plea where the record did not contain 'an affirmative showing that it was intelligent and voluntary.'" Defendant, however, concedes that the California Supreme Court, in In re Tahl, 1 Cal.3d 122, has ruled that Boykin is not to be applied retroactively. Therefore, if Tahl is controlling in this case, since defendant pleaded guilty before the time that Boykin was decided, then Boykin would not apply. Defendant contends, though, that "Tahl's holding of non-retroactivity is not controlling in . . . the case



at bar" because "Tahl is is factually distinguishable." Whether this case may be legally distinguished from Tahl is unnecessary for us to decide for, even if we apply the stricter test of Boykin, no error was committed. At the time that defendant renewed his motion to withdraw his plea, the trial judge stated: "I will concede that at the time that the plea was taken . . . the words used at that time are not consistent with the words of art that the Supreme Court now says that the court must utilize in taking the plea. But . . . I believe defendant knowingly and intelligently and voluntarily entered a plea to that charge, because I think that he knew, in fact, he was guilty of grand theft at the time he entered the plea."2/ Whether required

---

2/ The reporter's transcript reflects the following examination by the deputy district attorney (Rhodes) and answers by defendant immediately preceding the trial court's acceptance of defendant's plea of "guilty":

> "MR. RHODES: Your attorney, Mr. Lambros, has indicated to the Court and to the District Attorney's office that you wish to waive your right to a preliminary hearing and trial, and plead guilty to Count one of Complaint Number 238384 which alleges Grand Theft, a violation of 483.1 of the Penal Code, on or about the 4th day of January, 1966. Is all that information correct?

[Continued]

to do so at that time (before Boykin) or not, the judge, in denying defendant's motion, did apply the "knowingly and voluntarily" test which

---

2/ [Continued]

"THE DEFENDANT: Yes, it is.

"MR. RHODES: Do you understand the nature of the charge against you, that it is a felony?

"THE DEFENDANT: Yes, I do.

"MR. RHODES: Have you discussed this charge and the facts of this case with your attorney, Mr. Lambros?

"THE DEFENDANT: Yes, I have.

"MR. RHODES: Are you pleading guilty freely and voluntarily without threat or fear to yourself or to anyone closely related to you or associated with you?

"THE DEFENDANT: Yes, I am.

"MR. RHODES: Has anybody made any promises of a lesser sentence, probation, reward, immunity or anything else in order to induce you to plead guilty?

"THE DEFENDANT: No, they haven't.

"MR. RHODES: Do you understand that probation, if any, and sentencing, will be determined solely by the judge in the Superior Court?

"THE DEFENDANT: Yes, I do.

"MR. RHODES: . . . You are pleading guilty because in truth and in fact you are guilty, and for no other reason, is that correct?

"THE DEFENDANT: That's correct.

[Continued]

defendant advocates. On appeal, defendant's burden is to prove that the trial court's decision

---

2/ [Continued]

"MR. RHODES: Are you also pleading guilty because you personally feel you are guilty of Count One in that certain complaint number 238384?

"THE DEFENDANT: That is correct.

"MR. RHODES: Do you waive further reading of the complaint and are you now ready to plead?

"THE DEFENDANT: Yes, I am.

"MR. RHODES: In complaint number 238384, Mr. Zemliak, you are charged with Grand Theft in violation of 487.1 of the Penal Code in that on or about the 4th day of January, 1966, you did wilfully and unlawfully and feloniously take property that is money, in excess of two hundred dollars, to wit: ten thousand dollars, of the personal property of Eugene S. Firestone.

"To this particular charge, how do you plead, guilty or not guilty?

"THE DEFENDANT: Guilty."

represents a "clear abuse of discretion," and defendant has not met that burden.

The judgment is affirmed.

CERTIFIED FOR NONPUBLICATION.

STEPHENS, J.

We concur:

KAUS, P. J.

REPPY, J.

APPENDIX B

CLERK'S OFFICE SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

JAN 19 1972

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 2 Crim. *No.* 17226

People

vs.

Zemliak

Respectfully,

G. E. BISHEL
Clerk

APPENDIX C

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

2d Crim. No. 21495
Superior Court
No. A 238384
Court of Appeal - Second Di
F I L E D
Mar 15, 1972
Clay Robbins, Jr., Clerk

In re)
)
CHARLES ZEMLIAK)
)
on)
)
HABEAS CORPUS.)
)

THE COURT:

TO: PETER J. PITCHESS,
Sheriff of County of Los
Angeles, Respondent:

Upon reading the petition for a writ of habeas corpus and for recall of the remittitur filed by CHARLES ZEMLIAK, and good cause appearing therefor,

IT IS HEREBY ORDERED:

1. That the motion to recall the remittitur is denied.

2. That respondent show cause why a writ of habeas corpus should not issue as prayed in said petition, before Honorable James G. Kolts, Supervising Judge, Department 100, of the Superior Court of the State of California, for the County of Los Angeles, on a day to be fixed by said court.

3. All other relief prayed for in said petition is considered incidental to the petition for a writ of habeas corpus and is denied in this court, without prejudice to a renewed application to the said Honorable James G. Kolts.